

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DARRYL L. PALMER,) CASE NO.: C06-1075-JCC
)
Petitioner,)
)
v.) REPORT AND RECOMMENDATION
)
BENEDICT MARTINEZ,)
)
Respondent.)
_____)

INTRODUCTION

Petitioner Darryl L. Palmer proceeds *pro se* and *in forma pauperis* in this 28 U.S.C. § 2254 action. (Dkt. 1.) Respondent submitted an answer, arguing that petitioner’s § 2254 petition should be dismissed with prejudice. (Dkt. 16.) Petitioner submitted a response to that answer. (Dkt. 19.) Having reviewed the record in its entirety, including the state court record, the Court recommends that the petition be dismissed with prejudice.

BACKGROUND

Petitioner challenges his September 21, 2001 conviction by guilty plea to assault in the first degree (Count One) and assault of a child in the second degree (Count Two). (Dkt. 18, Ex. 1.) The King County Superior Court sentenced petitioner to an exceptional sentence of 220

01 months on Count One and a concurrent standard-range sentence of 75 months on Count Two.
02 (*Id.* at 4.)

03 In March 2002, petitioner appealed his conviction to the Washington Court of Appeals,
04 arguing that the trial court erred in imposing an exceptional sentence. (Dkt. 18, Ex. 4.) The
05 Washington Court of Appeals affirmed the exceptional sentence. (*Id.*, Ex. 3.) Petitioner
06 petitioned for review in the Washington Supreme Court in October 2002. (*Id.*, Ex. 6.) The
07 Washington Supreme Court denied review on April 29, 2003. (*Id.*, Ex. 7.) The Washington
08 Court of Appeals issued its mandate on May 15, 2003. (*Id.*, Ex. 8.)

09 On November 10, 2003, petitioner filed a motion to vacate his sentence in King County
10 Superior Court, asserting ineffective assistance of counsel. (*Id.*, Ex. 16.) The trial court denied
11 the motion to vacate. (*See id.* , Ex. 18.) On August 30, 2004, petitioner appealed in the
12 Washington Court of Appeals. (*Id.*, Ex. 9.) He argued that the exceptional sentence violated his
13 Sixth Amendment rights and was contrary to the United States Supreme Court decisions in
14 *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000),
15 and that the trial court violated his right to appointment of counsel under Washington Superior
16 Court Criminal Rule 3.1. (*Id.* at 1-4.) The Washington Court of Appeals denied the appeal. (Dkt.
17 18, Ex. 12.) The Washington Supreme Court subsequently denied a petition for review (*Id.*, Exs.
18 13 & 14.) The Washington Court of Appeals issued its mandate on June 27, 2006. (*Id.*, Ex. 15.)

19 DISCUSSION

20 Petitioner raises three grounds for relief in this habeas action, accurately summarized by
21 respondent as follows:

- 22 1. The exceptional sentence is invalid.

01 (a) The sentence violates Blakely v. Washington.

02 (b) There was insufficient evidence to support the exceptional term
03 because evidence did not expressly quantify the trauma that the child
suffered by being present during the assault on his mother.

04 2. The State breached the plea agreement by arguing in favor of the exceptional
sentence on appeal.

05 3. The State violated the separation of powers doctrine by advocating for the
06 exceptional sentence on appeal.

07 (Dkt. 16 at 3-4.) Respondent argues that petitioner failed to exhaust the second part of his first
08 ground for relief and the entirety of his second and third grounds, and that those claims are now
09 barred. Respondent further argues that the first part of petitioner's first ground for relief fails
10 because *Blakely* does not apply retroactively to cases on collateral review. For the reasons
11 described below, the Court agrees with respondent.

12 Exhaustion and Procedural Bar

13 "An application for a writ of habeas corpus on behalf of a person in custody pursuant to
14 the judgment of a State court shall not be granted unless it appears that . . . the applicant has
15 exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). The
16 exhaustion requirement "is designed to give the state courts a full and fair opportunity to resolve
17 federal constitutional claims before those claims are presented to the federal courts," and,
18 therefore, requires "state prisoners [to] give the state courts one full opportunity to resolve any
19 constitutional issues by invoking one complete round of the State's established appellate review
20 process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

21 A complete round of the state's established review process includes presentation of a
22 petitioner's claims to the state's highest court. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994).

01 However, “[s]ubmitting a new claim to the state’s highest court in a procedural context in which
02 its merits will not be considered absent special circumstances does not constitute fair
03 presentation.” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*,
04 489 U.S. 346, 351 (1989)). Consequently, presentation of a federal claim for the first time to a
05 state’s highest court on discretionary review does not satisfy the exhaustion requirement. *Castille*,
06 489 U.S. at 351; *Casey v. Moore*, 386 F.3d 896, 915-18 (9th Cir. 2004), *cert. denied* 125 S.Ct.
07 2975 (2005). *But see Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (“If the last state court to
08 be presented with a particular federal claim reaches the merits, it removes any bar to federal-court
09 review that might otherwise have been available.”)

10 Additionally, a petitioner must “alert the state courts to the fact that he was asserting a
11 claim under the United States Constitution.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.
12 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). “The mere similarity between a
13 claim of state and federal error is insufficient to establish exhaustion.” *Id.* (citing *Duncan*, 513
14 U.S. at 366). “Moreover, general appeals to broad constitutional principles, such as due process,
15 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Id.* (citing
16 *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

17 Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and
18 sentence in a criminal case may be filed more than a year after the judgment becomes final.
19 Additionally, if the state court expressly declined to consider the merits of a claim based on an
20 independent and adequate state procedural rule, or if an unexhausted claim would now be barred
21 from consideration by the state court based on such a rule, a petitioner must demonstrate a
22 fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented

01 compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v.*
02 *Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

03 In this case, petitioner did not exhaust the second part of his first ground for relief and the
04 entirety of his second and third grounds. Although he raised the third ground as a federal
05 constitutional violation in the Washington Supreme Court, he failed to raise that claim in the
06 Washington Court of Appeals. (Dkt. 18, Exs. 4 & 6.) Because petitioner raised this claim for
07 the first time in the Washington Supreme Court on discretionary review, it remains unexhausted.
08 *See Castille*, 489 U.S. at 351; *Casey*, 396 F.3d at 915-18. Also, petitioner failed to raise either
09 the second part of his first ground for relief or the second ground for relief as federal constitutional
10 violations in either state court. (Dkt. 18, Exs. 4 & 6.) (*See also id.*, Exs. 9, 13 & 16.) Because
11 it has been more than one year since petitioner's conviction became final (*see id.*, Ex. 8), and
12 because petitioner fails to establish either cause or prejudice excusing his procedural default, these
13 claims are procedurally barred by RCW 10.73.090.

14 *Blakely v. Washington*

15 This Court's review of the merits of petitioner's claims is governed by 28 U.S.C. §
16 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a
17 petitioner demonstrates that he is in custody in violation of federal law and that the highest state
18 court decision rejecting his grounds was either "contrary to, or involved an unreasonable
19 application of, clearly established Federal law, as determined by the Supreme Court of the United
20 States." 28 U.S.C. § 2254(a) and (d)(1). The Supreme Court holdings at the time of the state
21 court decision will provide the "definitive source of clearly established federal law[.]" *Van Tran*
22 *v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer*

01 *v. Andrade*, 538 U.S. 63 (2003). A state-court decision is contrary to clearly established
02 precedent if it “‘applies a rule that contradicts the governing law set forth in’” a Supreme Court
03 decision, or “‘confronts a set of facts that are materially indistinguishable’” from such a decision
04 and nevertheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting
05 *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)).

06 As reflected above, petitioner argues the invalidity of his sentence under *Blakely*.
07 Respondent counters that *Blakely* does not apply because petitioner’s direct appeal was no longer
08 pending at the time of that decision and because the Supreme Court has not made the decision
09 retroactive to cases on collateral review. *See Schardt v. Payne*, 414 F.3d 1025, 1033, 1036 (9th
10 Cir. 2005). Petitioner concedes that *Blakely* only became a possible argument during the collateral
11 attack on his conviction, but argues the applicability of *Apprendi*, which expressed the rule later
12 applied in *Blakely*. *See Blakely*, 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 490).

13 On June 26, 2000, the United States Supreme Court issued its opinion in *Apprendi*,
14 holding: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime
15 beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a
16 reasonable doubt.” 530 U.S. at 490. It was not until the June 24, 2004 *Blakely* decision,
17 however, that the Supreme Court clarified that “the ‘statutory maximum’ for *Apprendi* purposes
18 is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury*
19 *verdict or admitted by the defendant*.” 542 U.S. at 303 (emphasis in original; citing *Apprendi*, 530
20 U.S. at 490). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a
21 judge may impose after finding additional facts, but the maximum he may impose *without* any
22 additional findings.” *Id.* at 303-04. The *Blakely* Court concluded that the exceptional sentence

01 at issue in that case, which exceeded the top end of the standard sentencing range under the
02 Washington Sentence Reform Act, violated the Sixth Amendment because the facts supporting
03 the exceptional sentence were neither admitted by petitioner, nor found by a jury. *Id.* at 301-05.
04 As noted by respondent, in *Schardt*, the Ninth Circuit found that *Blakely* did not apply
05 retroactively to a conviction that was final before the announcement of the *Blakely* decision. 414
06 F.3d at 1033, 1038 (finding *Blakely* did not apply because defendant's direct appeal was no longer
07 pending at the time *Blakely* was decided).

08 In this case, petitioner clearly pursues a claim pursuant to the Supreme Court's holding in
09 *Blakely*. (See Dkt. 1 at 3-3B and Dkt. 19 at 2-4.) The Court finds no basis for petitioner's
10 apparent argument that the holding in *Blakely* should apply retroactively to cases pending at the
11 time of the *Apprendi* decision. (See Dkt. 18, Ex. 13 at 5-8 (making this argument before the
12 Washington Supreme Court.)) Instead, because *Blakely* does not apply retroactively, the first part
13 of petitioner's first ground for relief necessarily fails.

14 CONCLUSION

15 For the reasons described above, petitioner's habeas petition should be denied and this
16 action dismissed with prejudice. No evidentiary hearing is required as the record conclusively
17 shows that petitioner is not entitled to relief. A proposed order accompanies this Report and
18 Recommendation.

19 DATED this 8th day of January, 2007.

20 

21 Mary Alice Theiler
22 United States Magistrate Judge